

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
July 14, 2000 Session

IN RE: ESTATE OF PAUL ARTHUR BURNS, DECEASED

**An Appeal from the Chancery Court for Benton County
No. 9072 Ron E. Harmon, Chancellor**

No. W1999-01888-COA-R3-CV - Filed June 18, 2001

This is a claim against an estate. The trial court allowed a claim against the estate for \$12,000 in past due child support, even though the claimant failed to file her claim within the period prescribed by the notice to creditors. The guardian ad litem for a minor beneficiary of the estate appeals. We hold that "actual notice" to creditors under Tennessee Code Annotated § 30-2-307 means notice (1) that the decedent has died, and (2) that the estate proceedings have commenced and the time period within which claims must be filed. The record in this case does not show when the claimant received such "actual notice." Consequently, we remand to the trial court for clarification of the record on this issue.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Remanded

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Phillip G. Hollis, Camden, Tennessee, Guardian Ad Litem, for the appellant, Michael Paul Burns, a minor.

Steven L. West, McKenzie, Tennessee, for the appellee, Gale Frappollo Brady.

OPINION

This case involves a claim against an estate. The decedent, Paul Arthur Burns, was killed on December 13, 1994. At the time of his death, there was no indication that he left a valid will. Two years and eight months later, on August 14, 1996, the Chancery Court for Benton County granted Letters of Administration to Ronald Darby as personal representative of his estate. A Notice to Creditors was issued for publication on the same day. The notice stated:

All persons, resident and non-resident, having claims, matured or unmatured against his (or her) Estate are required to file the same in duplicate with the Clerk of the above named Court within six months from the date of the first publication (or of the

posting, as the case may be) of this notice, otherwise their claim will be forever barred.

No proof of publication was included in the record before this Court.

On November 21, 1996, Darby filed a motion in which he stated that he found a will signed by Burns. The will named Clyde W. Watson to be executor of Burns's estate. Darby's motion asked the trial court to decide whether the will should be honored. The record does not include the trial court's ruling on this question, but Darby continued in his capacity as administrator. On January 15, 1998, the trial court appointed a guardian ad litem, Phillip Hollis, to represent the interests of Michael Paul Burns, a minor son of the decedent.

On March 13, 1998, Appellee Gale Frappollo Brady ("Brady") filed an affidavit stating that she was a creditor of Burns's estate. In her affidavit, Brady asserted that she had a claim against "Peter Frappollo AKA Paul Burns" for \$12,000 in child support arrearage. On April 23, 1998, Darby filed an objection to Brady's claim, asserting that it was untimely, not submitted in the proper form, not accompanied by supporting documentation, and was barred by the statute of limitations.

A hearing was held on Brady's claim on February 17, 1999. At the hearing, the parties did not dispute that Burns owed Brady \$12,000 in child support arrearage. Brady testified that she filed a claim in Circuit Court on March 29, 1995, three months after Burns's death. She was told by the clerk that Burns's estate was not yet opened. She then filed a lien against Burns's property and made telephone calls to Clyde Watson, Phillip Hollis, and Ronald Darby, informing each about her claim. Darby testified that he knew of Brady's attempt to file a claim in the Circuit Court, but he could not confirm whether Brady had told him of the claim.

At the hearing, the Chancellor remarked that Brady was a working mother, and that the child support arrearage needed to be paid, if possible, out of the proceeds of the estate. On March 25, 1999, the Chancellor entered an order allowing Brady's claim against Burns's estate in the amount of \$12,300. The Guardian Ad Litem then filed this appeal.

On appeal, the Guardian Ad Litem argues that Brady's claim was not timely filed, that her affidavit was not accompanied by a certified copy of the judgment awarding child support, and that the situs of her affidavit, Suffolk County, New York, was impeached by the notary's seal, which stated "Hancock County, Mississippi."

An appeal from a bench trial is reviewed *de novo*, with a presumption of correctness in the trial judge's findings of fact. *See* Tenn. R. App. P. 13d.

Tennessee Code Annotated § 30-2-307 (Supp. 2000) sets forth the time in which a creditor of an estate must file his claim. Section 30-2-307(a)(1) states "[a]ll claims against the estate arising from a debt of the decedent shall be barred unless filed within the period prescribed in the notice

published or posted in accordance with § 30-2-306(c).” The statute includes two exceptions to this rule:

(A) If a creditor receives actual notice less than sixty (60) days before the expiration of the period prescribed in § 30-2-306(c) or after the expiration of the period prescribed in § 30-2-306(c) and more than sixty (60) days before the date which is twelve (12) months from the decedent’s date of death, such creditor’s claim shall be barred unless filed within sixty (60) days from the date of receipt of actual notice; or

(B) If a creditor receives actual notice less than sixty (60) days before the date which is twelve (12) months from the decedent’s date of death or receives no notice, such creditor’s claim shall be barred unless filed within twelve (12) months from the decedent’s date of death.

Tenn. Code Ann. § 30-2-307(a)(1).

Therefore, the applicability of these exceptions turns on when Brady received “actual notice.” In *In re Estate of Jenkins v. Guyton*, 912 S.W.2d 134 (Tenn. 1995), the Tennessee Supreme Court considered whether the executor’s communication to the creditor’s attorney that (1) the decedent had died, and (2) his will was being probated, constituted “actual notice” under Tennessee Code Annotated § 30-2-307(a)(1). The *Guyton* court noted that the United States Supreme Court held that due process required that “actual notice” be given to creditors who were “known” to the administrator or who were “reasonably ascertainable.” See *Guyton*, 912 S.W.2d at 136 (discussing *Tulsa Prof’l Collection Servs. v. Pope*, 485 U.S. 478, 490 (1988)). *Guyton* observed that the Tennessee Legislature amended the notice provisions of Section 30-2-306 after *Pope* to require the personal representative to mail or deliver a copy of the published or posted notice to all creditors “of whom the personal representative has actual knowledge or who are reasonably ascertainable by the personal representative, at such creditors’ last known addresses.” *Guyton*, 912 S.W.2d at 136 (quoting Tenn. Code Ann. § 30-2-306(e)). The Court held that a letter to the creditor’s attorney informing him of the decedent’s death and that his will was being probated was not sufficient. It stated that the personal representative need not mail an exact copy of the published notice, but “such notice must, at a minimum, include information regarding the commencement of probate proceedings and the time period within which claims must be filed with the probate court.” *Guyton*, 912 S.W.2d at 138. Consequently, from *Guyton*, it appears that a creditor, in order to have “actual notice,” must have notice of the commencement of probate proceedings and the time period within which claims must be filed.

In the instant case, it is undisputed that Brady had notice of Burns’s death no later than March 29, 1995, the day she attempted to file a claim in Circuit Court. However, under *Guyton*, Brady did not receive “actual notice” until she received “information regarding the commencement of probate proceedings and the time period within which claims must be filed with the probate court.” *Id.* It is undisputed that Darby had knowledge of Brady’s status as a potential creditor of the estate since

Darby knew of Brady's earlier attempt to file a claim in Circuit Court. However, the record does not indicate whether Darby delivered notice to Brady or even whether the notice to creditors issued on August 14, 1996 was published.

Under Tennessee Code Annotated § 27-3-128, an appellate court may remand the cause to the trial court for correction of the record "where, in its opinion, complete justice cannot be had by reason of some defect in the record, want of proper parties, or oversight without culpable negligence." Tenn. Code Ann. § 27-3-128 (2000). Under these circumstances, we conclude that "complete justice" cannot be had unless this case is remanded to the trial court for clarification of the record. On remand, the trial court should determine when Brady received "actual notice," i.e., "information regarding the commencement of probate proceedings and the time period within which claims must be filed with the probate court," whether Darby fulfilled his obligation under Tennessee Code Annotated § 30-2-306(e) to deliver notice to her, and whether the notice to creditors issued on August 14, 1995 was published. From this, the trial court can determine the time period within which Brady was required to file a claim, and whether Brady's claim is time-barred.

The case is remanded to the trial court for further proceedings consistent with this Opinion. Costs of this appeal are taxed equally to the appellee, Gale Frappollo Brady, and the appellant, Michael Paul Burns, and their sureties, for which execution may issue if necessary.

HOLLY KIRBY LILLARD, JUDGE